

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re:

NORTHWEST TERRITORIAL MINT,
LLC

Debtor

Case No. 16-11767-CMA
Chapter 11

**REPLY IN SUPPORT OF MOTION FOR
ALLOWANCE AND PAYMENT OF
ADMINISTRATIVE EXPENSE CLAIM**

COMES NOW Bill Atalla, former CEO of the debtor, and submits the following reply in support of his motion for allowance and payment of his administrative expense claim. Accompanying this reply is the Supplemental Declaration of Bill Atalla.

1. Timing of Payment

The trustee argues that Atalla, in seeking immediate payment of a portion of his claim, is trying to obtain a “super-priority”, and that there is no authority for this in the Bankruptcy Code. The trustee has things reversed: Atalla, as an employee of the debtor corporation, was entitled to be paid in the ordinary course as he rendered services. This is so both under his employment agreement and under Nevada law. Rather, it is the trustee who lacks any authority for withholding payment from Atalla. The trustee is seeking to benefit from his own misconduct (failure to pay wages and salaries when due), by trying to require Atalla to accept partial compensation on a pro rata basis.

Atalla was an employee of the debtor corporation, not a professional employed by the estate. Unlike the other professionals in this case, working for Northwest Territorial Mint was Atalla’s full-time job. Other professionals, such as the trustee and his attorneys, work on multiple cases at the same time and are therefore not as

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1 vulnerable to the cash flow risks of any single business. That is why it would be
2 fundamentally unfair to lump Atalla in with the other professionals and require him to
3 take a pro rata share of the funds available for administrative expenses.

4 **Collier** makes clear that ordinary course expenses of a Chapter 11 estate, such as
5 post-petition wages and trade debt, are to be paid when due, and are not subject to
6 subsequent disgorgement. 4 **Collier on Bankruptcy** ¶ 503.03[4], [5] (16th 2018). Had the
7 trustee fulfilled his legal duty as an employer under the employment contract and
8 Nevada law, Atalla would have been paid *at least* the following sums by December 31,
9 2017: Deferred salary, \$12,500; Final paycheck, \$25,000; Severance pay, \$75,000¹; and
10 Un-reimbursed expenses, \$2,909 (a total of \$115,409). (As discussed in the motion, since
11 Atalla's last paycheck was delayed over 30 days, Nevada law imposes a late payment
12 penalty of one month's pay; thus, although the final paycheck was eventually paid, the
13 penalty remains due and owing.)

14 **2. Late Payment Penalty**

15 Contrary to the trustee's assertion (ECF #1650 at page 2, lines 13-14), Atalla never
16 agreed to defer or delay his final paycheck or his severance pay. In fact, he had had so
17 much trouble getting paid, with multiple delayed payments and bounced checks, that he
18 specifically demanded immediate payment. See Supplemental Declaration of Bill Atalla.
19 In any event, under the Nevada statute, Nev. Rev. Stat. 608.040, Atalla was entitled to be
20 paid his severance pay – which the trustee concedes to be \$75,000 and Atalla contends is
21 \$100,000 – on termination, and that clearly was not done.

22 **3. Vacation Pay**

23 As described in the supplemental declaration of Bill Atalla, the debtor corporation
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25 ¹ Atalla believes his severance pay is actually \$100,000, as discussed herein.

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1 was in crisis mode throughout his tenure as CEO, and he simply could not take vacation.
2 Had he asked his supervisor (the trustee) for time off, his request would undoubtedly
3 have been refused. Where management makes it impossible for an employee to take
4 vacation, it is fundamentally unfair for management to rely on a “no cash-out” policy to
5 refuse vacation pay. Courts considering the allowance of vacation pay as an
6 administrative expense have generally allowed it if it was accrued post-petition. See,
7 eg., *In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992).

8 It should be noted that the December 2017 Monthly Operating Report, ECF # 1417
9 at page 42, lists the post-petition payable to Atalla at \$391.33, which is apparently a mis-
10 calculation of his accrued vacation pay. Yet surely the trustee knew that as of December
11 31, 2017, Atalla was owed at least \$115,409. And if, as the trustee asserts, there is no
12 cash-out of vacation pay, why was this post-petition payable listed in the first place?

13 **4. Severance**

14 The trustee concedes that Atalla is owed \$75,000 of severance pay, \$25,000 for
15 each quarter of completed service. Atalla submits that he is owed \$100,000 of severance
16 pay; first because he actually completed the fourth quarter of service (he was discharged
17 at the close of business on the last business day of the quarter); second because, under
18 Nevada law, if the trustee wanted to obtain the benefit of discharging Atalla two days
19 short of the end of the quarter, he had to pay him in full at the time of termination; and
20 third because, in fact, the trustee sought and obtained Atalla’s ongoing services after
21 December 29, 2017.

22 Moreover, the trustee’s present position is inconsistent with the representation
23 made to the Court in the motion seeking approval of Mr. Atalla’s employment. The
24 motion, ECF #857, at pages 3-4, says “In the event that the Trustee terminates Mr.
25 Atalla’s employment prior to December 31, 2019, the company will pay Mr. Atalla

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1 severance in the total amount of \$100,000.” Atalla bargained for severance pay knowing
2 the risks of this type of employment, and he is entitled to immediate payment of such
3 severance, in full.

4 **5. Post-December 29, 2017 Services**

5 Contrary to the trustee’s assertion, Atalla did not render an additional services
6 after his purported termination solely as a volunteer and solely for his own benefit. He
7 worked to find a buyer for the debtor corporation at the trustee’s specific request. He
8 did so to save the jobs of the 113 employees who had been laid off, and to salvage some
9 value for creditors. He did not have an agreement for future employment with the
10 prospective purchaser.

11 The trustee argues that Atalla’s efforts did not result in a sale, and therefore, he
12 conferred no benefit on the estate, and should not be compensated. The same can be
13 said of the trustee’s efforts to find a buyer. Simply put, ultimate success is not the
14 criterion for awarding professional compensation in a Chapter 11 case; it is whether the
15 services were reasonably intended to benefit the estate. *In re Xebec*, 147 B.R. 518 (BAP
16 9th Cir. 1992). Atalla’s services clearly were reasonably intended to benefit the estate.

17 Moreover, the trustee’s argument is a tacit admission that, had Atalla’s efforts
18 been successful, he would be entitled to compensation.

19 Atalla’s hourly rate for these services is the same as the trustee’s hourly rate. His
20 experience and expertise in the relevant industry being greater than the trustee’s, this is
21 a bargain for the estate.

22 Although Atalla was initially not formally employed pursuant to Bankruptcy
23 Code §327, his initial employment was approved by the Court and he was an officer of
24 the estate. Having actively sought Atalla’s services after his termination as CEO, it was
25 incumbent on the trustee to seek approval of such employment under Bankruptcy Code

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§327. It was not up to Atalla to seek such approval. The trustee should not benefit from having failed to do so.

In order to obtain *nunc pro tunc* approval of employment, the applicant must show 1) a reasonable excuse for not obtaining prior approval; and 2) a material benefit to the estate. *In re THC Financial Corp.*, 837 F2nd 389, 392 (9th Cir. 1988). One reasonable excuse for not obtaining prior approval is that it was someone else's responsibility to do so. *In re Garden Ridge Corp.*, 326 BR 278 (Bankr. D. Del. 2005). And, as discussed above, Atalla's efforts to find a buyer, while unsuccessful, were reasonably intended to benefit the estate. To the extent necessary to allow his post-December 29, 2017 claim, Atalla's employment should be approved *nunc pro tunc*.

6. Attorney Fee

Atalla's employment agreement provides for an award of attorney fees to the prevailing party in any action to enforce the agreement, ECF #897-1, page 9, section 20. The Declaration of Donald A Bailey details the attorney fees Atalla has incurred to obtain the payments due to him, in the amount of \$4303.41.

CONCLUSION

For the foregoing reasons, the Court should enter an order directing the trustee to forthwith pay Atalla the following sums:

Deferred compensation	\$12,500.00
Expense reimbursement	\$2909.00
Vacation pay	\$25,000.00
Severance pay	\$100,000.00
Late payment penalty	\$25,000.00
TOTAL	\$165,409.00

The Court should further award Atalla an administrative expense claim of

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1 \$54,800.00 for his post-December 29, 2017 services, plus attorney fees of \$4303.41, a total
2 of \$59,103.41, to be paid on the same basis as other administrative expenses herein.

3 Dated: May 15, 2018

4 DONALD A BAILEY
5 Attorney at Law

6 /s/ Donald A Bailey
7 WSB#12289
8 Attorney for Atalla
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